SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 764

SP4 BRADISH G. MORSE, ER 15 729 742, *et al.*,
Petitioners,

vs.

COLONEL CHARLES B. BOSWELL, Commanding Officer, Fort George G. Meade, Maryland; HONORABLE CLARK CLIFFORD, Secretary of Defense; HONORABLE STANLEY R. RESOR, Secretary of the Army; GENERAL HAROLD K. JOHNSON, Chief of Staff of the Army; and LT. GENERAL JONATHAN O. SEAMAN, Commanding General, First United States Army,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on August 26, 1968.[1]

[1]The other Petitioners include:

CPL David E. Bowen, ER 15 681 739; PFC Romolo J. Grilli, ER 15 708 686; SP4 Edward L. Harman, ER 15 681 461; PFC William F. Millard, ER 15 715 789; PFC Stanley D. Norr, ER 15 729 788; PFC George J. Perkins, ER 15 681 750; PFC Larry D. Potts, ER 15 709 232; SP4 Kenneth R. Powers, ER 15 709 275; SP4 Richard T. Rubin, ER 15 681 743; CPL Donald S. Salamon, ER 15 694 792; PFC Richard J. Sowul, ER

(This footnote is continued on the next page)

Citations to Opinions Below.

The opinion of the District Court is reported in the advance sheets and is printed in Appendix B hereto, *infra,* page 12. The opinion of the Circuit Court of Appeals is also reported in the advance sheets and is printed in Appendix B, hereto, *infra,* page 11.

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23 391 217; SP4 Gerald A. Betts, ER 15 694 820; PFC Maurice J. Escott, ER 15 694 852; SP4 Bruce D. Fatica, ER 15 681 763; SP4 William A. Fink, ER 15 689 879; PFC Donald W. Horvat, ER 15 714 766; PFC Keith A. Johns, ER 15 729 792; PFC Russell P. Mahoney, ER 15 695 162; PFC Fred E. McVetta, ER 15 709 430; PFC David T. Motulewicz, ER 15 709 230; SP4 Donald F. Nehez, ER 15 689 632; PFC Nicholas A. Petti, ER 15 716 272; PFC Joel D. Sech, ER 15 709 422; PFC James R. Shirak, ER 15 694 790; SP4 John A. Takac, Jr., ER 15 689 629; PFC James N. Worgull, ER 15 716 288; PFC Edward S. Zahurak, ER 15 681 686; PFC Barry Zaslov, ER 23 611 220; PFC John J. Zajac, ER 15 729 756; SP4 William T. Barrett, ER 15 694 822; SP4 Arthur N. Bloch, ER 15 681 765; PFC Ronald J. Bollo, ER 15 709 265; SP4 Edward J. Bugajski, ER 15 681 292; SP4 Edward G. Cavanagh, ER 15 708 770; PFC Joseph A. Cole, Jr., ER 15 708 733; PFC Harry E. Dibaggio, ER 15 715 790; SP4 Joseph M. Erjavec, ER 15 689 638; PFC Robert L. Globokar, ER 15 714 632; SP4 Edward C. Golias, ER 15 689 868; PFC James S. Kontur, ER 15 709 203; SP4 James J. Malloy, ER 15 681 760; PFC Robert M. McNeely, ER 15 694 827; SP4 Joseph A. Oriti, ER 15 694 854; SP4 Russell E. Otto, ER 23 509 934; PFC Theodore D. Paul, ER 15 729 739; SGT Louis M. Yacobucci, ER 15 680 784; SP4 George Champion, ER 15 708 464; PVT Frank S. Cirino, ER 15 695 195; PVT Michael A. Dymond, ER 15 709 267; PFC Kenneth R. Fienga, ER 15 707 993; PFC Nicholas Gambatese, ER 15 709 242; SP4 John N. Gaydos, ER 15 694 860; PVT William MacCartney, ER 15 709 240; SP4 Gerald M. Maslowski, ER 15 695 100; PVT Kenneth P. Mauer, ER 15 694 785; PFC Raymond McCulloch, ER 15 709 272; SP4 Jan C. Plona, ER 15 695 150; CPL Robert E. Reginelli, ER 15 694 783; PFC Adolf B. Witzke, ER 15 689 670; PFC Norman Zenisek, ER 15 680 941; PFC Nicholas Doljac, ER 23 509 950; SP4 Gerald T. Kocan, ER 15 681 749; SP4 Ralph R. Lichtenberg, ER 15 689 635; PFC Roger H. Tilicki, ER 15 714 718; PFC Joseph C. Zemko, ER 15 738 325; PFC Vance D. Burbridge, ER 15 680 942; PFC Nicholas R. Cesa, ER 15 714 760; PFC Richard H. Damen, ER 15 708 001; PFC Thomas J. Gallagher, ER 15 709 229; SP4 Ralph W. Lanzara, ER 15 695 139; SP4 Thomas F. Mathias, ER 15 694 823;

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 26, 1968. (R. 6.) The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254-(1).

Questions Presented.

1. Whether application of §101 of Public Law 89-687, Title 1, October 15, 1966, 80 Stat. 981, to persons who entered into enlistment contracts with the United States Army to serve in the United States Army Reserve, prior to the effective date of said Act, is unconstitutional as being violative of the Fifth Amendment of the Constitution of the United States.

PVT Michael Nero, ER 15 695 156; SP4 Joseph J. Rini, ER 15 694 824; SP4 Gerald A. Salerno, ER 15 689 618; SP4 James E. Terpay, ER 15 709 412; SP4 Bruce A. Trejbal, ER 15 681 754; SP4 Edwin L. Barndt, ER 15 694 793; PFC Edmond R. Benedictus, ER 15 694 779; PFC Terrance R. Frygier, ER 15 709 281; PFC James C. Polak, ER 15 715 766; PFC Benson C. Spyke, ER 15 709 263; PFC Edward J. Byszewski, ER 15 709 278; PFC Neal R. Brickman, ER 15 708 764; SP4 John E. Deagro, ER 15 681 753; PFC Neal A. Fazzio, ER 15 695 172; PFC Calvin J. Sirkin, ER 23 398 689; PFC Raymond Bentkowski, ER 15 729 772; PVT Joseph J. Fondale, ER 23 549 810; PFC Richard G. Elliott, ER 15 694 807; SP4 Martin J. Glozer, Jr., ER 15 708 080; SP4 Thomas R. Muni, ER 15 738 198; SP4 Thomas E. Pamula, ER 23 526 966; SP5 Joel P. Osher, ER 15 709 276; PVT Robert A. Zronek, ER 15 738 066; SSG Ronald J. Franko, ER 15 694 828; PFC Dennis E. Mangan, ER 15 709 202; SP4 Robert Bysura, ER 15 681 456; CPL John R. Szilvasi, ER 15 689 872; PFC James A. Goglin, ER 15 709 227; SP4 Donald P. Enting, ER 15 681 300; PFC Robert B. Boody, ER 15 689 865; SP4 Robert A. Cerney, ER 15 714 889; PVT Weldon M. Chatting, ER 15 689 888; PVT Phillip D. Prestigomo, ER 15 694 782; PFC Howard C. Strong, Jr., ER 15 729 759; PFC Jack L. Pate, ER 15 699 370; PFC Zeno A. Zak, ER 15 709 283; PFC John R. Clary, ER 15 694 870; PVT Carl P. Bongiorno, ER 15 709 199; PVT Gerard T. Rybicki, ER 15 708 022; PFC Allan J. Zenkewicz, ER 15 716 037; PFC Norman S. Martucci, ER 15 715 795.

2. Whether subsection (e) of said §101 is unconstitutional as constituting an unlimited delegation of legislative power by the Congress to the President.

3. Whether said Act and the Executive Order and the Secretary of Defense's "Memorandum for Secretaries of the Military Departments" issued pursuant thereto, authorized the Department of the Army to order to active duty any member of the Ready Reserve for a period which calls for total service on active duty or active duty for training for more than 24 months.

4. Whether, if said Act is construed so as to make a distinction, with regard to the period of active duty to be served, between a member of the Ready Reserve ordered to active duty as a member of a unit ordered to active duty and an individual member so ordered but not as a member of a unit so ordered, said Act is unconstitutional as applied to a member so ordered for a period which calls for total service on active duty or active duty for training for more than 24 months, as being violative of the "equal protection" clause of the Fourteenth Amendment.

Constitutional Provisions, Statutes, and Orders Involved.

The United States constitutional provisions involved are the "due process" clause of the Fifth Amendment; the "equal protection" clause of the Fourteenth Amendment; and Clauses 11, 12, and 14 of Section 8, Article 1, set forth here verbatim.

ARTICLE I, Section 8
(Clauses 11, 12, and 14)

> "The Congress shall have power . . . to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

> to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces; . . ."

The statutory provisions involved are §101 of Public Law 89-687, Title 1, 80 Stat. 981; Title 10 U.S.C. §§262, 263, 268, 672, 673, 679, 3495, 3500, 8495, 8500; and Title 32, U.S.C. §102. They are printed in Appendix A, *infra,* pp. 1-9.

The orders involved are Executive Order No. 11,406, 33 Fed. Reg. 5735 (1968); the Secretary of Defense's "Memorandum for Secretaries of the Military Departments," dated 11 April 1968; and pages 5 and 10 of Department of the Army Joint Message form DA 859314, dated April 11, 1968. They are printed in Appendix A, *infra,* pp. 9-10, except for two pages inserted.

Statement.

Petitioners, all members of a single unit of the U. S. Army Reserve on inactive duty, were ordered in April-May, 1968, to active duty as members of said unit for 24 consecutive months unless sooner released, by the Department of the Army pursuant to authority delegated by the President and the Secretary of Defense under provisions of Public Law 89-687, §101. Each of them had enlisted prior to October 15, 1966, the effective date of said Act, having executed certain enlistment documents which in the courts below have been treated as constituting their enlistment agreement.[2]

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[2]See Exhibits A1-A4 to Petition and Complaint, district court record on appeal, and Stipulation and Order dated August 2, 1968, district court record on appeal. See also District Court Opinion, Appendix B, *infra,* pp. 13, 14, 22, 23.

Petitioners, 113 in number, challenging the validity of their active duty orders and seeking immediate release to inactive duty status, jointly and individually filed on July 26, 1968, in the United States District Court for the District of Maryland, within whose territorial jurisdiction they were then held in custody on active duty at Fort George G. Meade, a pleading captioned "Petition For Writ of Habeas Corpus; Complaint For Declaratory Judgment, Permanent Injunction And Mandamus; And Motion For Temporary Restraining Order And Preliminary Injunction To Stay Military Orders." The jurisdiction of the District Court was invoked, in part, under the provisions of Title 28 U.S.C. §2241 *et seq.* for habeas corpus relief.

By agreement of counsel for both sides, said pleading was treated by the district court as 113 separate petitions for writs of habeas corpus, Petitioners having also stipulated to dropping of those portions of their Petition and Complaint seeking injunctive relief and the convening of a three-judge court. A consolidated hearing was held in the district court under Rule 42(a) of the Federal Rules of Civil Procedure, pursuant to said agreement of counsel. (See District Court Opinion, Appendix B, *infra,* p. 12.)

Counsel for both sides in their written briefs and oral argument agreed that the provisions of pertinent statutory law existing when each Petitioner signed the enlistment documents were "incorporated in the documents and became part and parcel of the enlistment contract," and the District Court so held. (See District Court Opinion, Appendix B, *infra,* p. 14.)

In its opinion (Appendix B, *infra,* p. 21), the District Court stated its disagreement with the opinion in *Gion v. McNamara.* Civil No. 67-1563-EC (C.D., Cal. Jan. 9, 1968) "(I)f it stands for the proposition that the 'otherwise authorized by law' phrase of 10 U.S.C. §673 has no prospective effect", and its agreement with an apparently conflicting statement in *Winters v. United States,* 281 F. Supp. 289, 295-296 (E.D.N.Y. 1968), affirmed *per curiam,* 390 F.2d 879 (2d Cir. 1968), cert. den., 393 U.S. ...., October 14, 1968.[3]

The district court judge, without placing "reliance or weight" upon specific language in the enlistment documents, applied the statutory provisions discussed in his Opinion and denied the habeas corpus relief sought. The appellate court on August 26, 1968, in special session, affirmed *per curiam,* "(F)or the rea-

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[3]In *Gion,* the government's appeal and a cross-appeal in the United States Court of Appeals for the Ninth Circuit (No. 22,835) was remanded to the district court in June, 1968, upon a government motion grounded on mootness pending appeal. Petitioner Gion, having previously applied for discharge from military service as a conscientious objector, was honorably discharged from the Marine Corps Reserve in April, 1968. Pursuant to the order of remand, the district court on November 12, 1968 ruled that it would order its judgment vacated and the action dismissed. As of date hereof, said order has not yet been filed or entered. It is the intention of one of Gion's counsel (Nathan R. Zahm, who is one of counsel for Petitioners herein) to file an appeal of said order, after it has been entered, to the United States Court of Appeals for the Ninth Circuit.

In *Winters,* declaratory relief was sought in the New York district court. Winters filed a petition for a writ of habeas corpus on June 3, 1968, in the United States District Court for the Southern District of California (*Winters v. United States,* Civil No. 68-131-K). The petition was denied and Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed by Winters on September 13, 1968. Mr. Justice Douglas, circuit justice, Supreme Court, on October 21, 1968, ordered his deployment stayed pending disposition of the appeal (No. 23,367) in the Ninth Circuit.

sons stated by the District Court". Appendix B, *infra,* p. 1i.

On August 30, 1968, counsel for Petitioners mailed to the Clerk of this Court, then in vacation, an Application for Order Staying Judgments Below and Enjoining Issuance Or Execution of Military Orders, etc. Said application, directed to Mr. Chief Justice Earl Warren, was by him denied, and was also denied by Mr. Justice Hugo Black when later submitted to him at said counsel's request. Mr. Justice William O. Douglas, to whom said application was still later submitted at said counsel's request, on September 12, 1968, ordered stayed the deployment of Petitioners to service outside the territorial boundaries of the United States "to enable the Court to consider and pass upon such application on or after October 7, 1968". (Appendix C, *supra,* p. 27.)

On October 7, 1968, this Court denied said application and an application for an order extending the stay granted by Mr. Justice Douglas, the latter dissenting. (Appendix C, *supra,* p. 28.) Approximately 100 of the Petitioners are now on active duty in South Vietnam.

Reasons for Granting the Writ.

A decision by this Court on the issues here presented, questioning the validity of application of Public Law 89-687 and/or the military orders issued pursuant thereto, will affect not only many thousands of reservists in the Armed Forces already ordered to active duty pursuant to its provisions, but will determine whether additional reservists may yet be called to active duty up to October 15, 1972, without a declaration of war or national emergency declared by Congress or a na-

tional emergency declared by the President. Those thousands include reservists who enlisted prior to October 15, 1966, the effective date of said Act, and who have up to six years of service remaining under their enlistment contracts. There are more than one million reservists in the U. S. Army Reserve alone at this time, the majority of whom enlisted prior tc October 15, 1966. Approximately 28,000 men in Reserve Components of the Army, Navy and Air Force were ordered to active duty in April-May, 1968 under the provisions of said Act, including those so ordered as members of 88 units so ordered and approximately 3600 so ordered as individuals not assigned to units. The additional number of reservists ordered to active duty in units for up to 24 months in January, 1968 (and as individuals in 1967 and 1968 for failure to satisfactorily perform their reserve obligations) is not known to counsel. All reservists who enlisted prior to October 15, 1966 are affected by the questions presented, for if application of said Act is found to be unconstitutional as to these 113 petitioners, as violating their contract rights, then it appears that for the same reason it could not properly be applied to such others.

The futures of these many thousands of men rests on a determination of these questions, for active duty status may require either their remaining in, or being deployed to, combat areas in foreign lands where their lives are in danger, or, at the least, the disruption of their domestic lives and civilian occupations otherwise pursued as reservists in an inactive duty status.

With reference to the long-range future, a decision in this case should determine whether legislation similar to subsection (e) of §101, Public Law 89-687, with

reference to the activation of units, may properly be adopted by Congress. The operative effect of said subsection expired on June 30, 1968, but unless this Court rules on the question of separation of powers here presented, it will not be clear whether future legislation is constitutional which empowers the President, without a declaration of war or national emergency by Congress and without himself declaring a national emergency, to activate units of the Ready Reserve on the sole basis that "he deems it necessary."

Aside from the basic question of the propriety of their activation in the first place, there is need for determination of the issue as to whether the preponderant majority of reservists thus far activated as members of units may properly be required to serve four to six months longer on active duty than those not ordered as members of units. For those particular thousands the additional months of active duty service extends the danger of loss of life or the possibility of losing opportunities for advancement in civilian pursuits.

Beyond the personal interests of the thousands of reservists involved, a decision in this case may affect the entire citizenry of the country, for, as Mr. Justice Douglas pointed out in his dissenting opinion On Application For Stays (Appendix C, *supra*, p. 35), there is also the underlying issue as to "how legislation shall be read in order, if possible, to avoid creating a 'credibility gap' between the people and their government".

This issue also affects the future maintenance and development of the Ready Reserve enlistment program, for it seems likely that thousands of potential

Reserve enlistees will be lost to the Armed Forces if they are given to understand that the conditions under which they may be activated are subject to determination by legislation adopted by Congress after their enlistment, and that this may place the matter entirely within the sole discretion of the President.

It will be noted from a reading of the District Court's Opinion that basic to the judgments below was construction of the phrase "or when otherwise authorized by law" in Title 10 U.S.C. §673. The district court judge held (Appendix B, *infra,* p. 20) that "the word 'when' clearly looks to the future", relying in part on certain statements in the opinion in *Winters v. United States, supra,* which he said appears to be in conflict in principle with the decision in *Gion v. McNamara, supra,* Although neither *Winters* nor *Gion* dealt directly with the quoted phrase in §673, the construction of contract language in those cases, by way of dictum or implication, is relevant because of close similiarity of that language to that in §673.

Since entry of the judgments below, counsel for Petitioners has discovered a Supreme Court case in which Mr. Justice Holmes rendered an interpretation of statutory language almost identical with the pertinent phrase in §673, and which appears to support Conclusion of Law No. 2 in *Gion* (R, Appendix, p. 5). That case is *United States v. Dalcour,* 203 U.S. 408 (1906), in which interpretation of the phrase "unless otherwise provided by law" was an issue. Mr. Justice Holmes stated, at page 421:

> "These words must be taken to refer to *existing* provisions and not to be merely a futile permission to future legislatures to make a change." (Emphasis added.)

Petitioners contend, as they have below, that the pertinent phrase in 10 U.S.C. §673 similarly refers to "existing provisions", so that Public Law 89-687 may not constitutionally be applied to Petitioners whose enlistment contracts were executed prior to adoption of that law.

Petitioners further contend that if Congress intended its language in §673 to "look to the future", it would have used the word "whenever" (as it has in many other statutes) and not "when". Cases on this point include *Ziegler v. Chapin,* 27 N.E. 471 (1891), where the court said at page 473:

> "With all due respect to the potency of the adverb, we must not fail to observe that it is 'when' and not 'whenever'. It respects a point of time in the progress of a single negotiation, and not in the events of an unlimited future".

Similarly, the court in *In re Germer's Will,* 154 Misc. 720 (1935), interpreting the phrase "when authorized by the supreme court" in a New York statute, held at page 722:

> "The context of the above-quoted portions of the statute requires that the word 'when' . . . be interpreted as 'if' and not as 'whenever' . . ."

That "whenever" ". . . generally refers to the future and means 'at whatever time' " was pointed out in *Hobby v. Hodges,* 215 F. 2d 754, 758 (10th Cir. 1954). There appears to be no case which supports the holding that " 'when' clearly looks to the future".

A majority of this Court after full consideration may well agree with the finding of Mr. Justice Doug-

las in his dissenting opinion. On Application For Stays (Appendix C, *supra,* p. 34), that the pertinent phrase in §673 "plainly refers to those additional conditions—other than war or national emergency—upon which members of the reserve can be called to active duty." (See his footnote No. 17, p. 34, therein.)

Such statutory construction, as contended by Petitioners, calls for reversal of the judgments below on the grounds of abridgment of contract rights. *Perry v. United States,* 294 U.S. 330 (1934); *Lynch v. United States,* 292 U.S. 551 (1934); *Miller v. Howe,* 77 F. Supp. 540 (1948); *United States v. Bonnell,* 180 F. 2d 145 (1950); *McShain v. District of Columbia,* 205 F.2d 882 (1953); *United States v. 85.11 Acres of Land, etc.,* 243 F. Supp. 423 (1965).

Such a ruling by this Court would necessarily be based further on its determination that the district court also erred in holding (Opinion, Appendix B, *infra,* p. 23) that "even if 10 U.S.C. §673 had never been enacted, this Court believes that Public Law 89-687 does not abridge the provisions of the contractual documents petitioners rely upon since these instruments include by incorporation 10 U.S.C. §263".

Petitioners contend that the latter holding overlooks the pertinent part of Title 10 U.S.C. §268 that states:

> "The Ready Reserve consists of units or Reserves, or both, liable for active duty as provided in sections 672 and 673 of this title."

It is to be noted that no reference is made therein to §§262 or 263 with regard to liability for active duty. Further, the legislative history of §263, when read together with that of Title 32 U.S.C. §102 and Title

10 U.S.C. §§3495, 3500, 8495, and 8500, indicates that the term "national security" in §263 relates solely to "protection of the nation from internal subversion or foreign aggression," as defined by Mr. Justice Harlan in *Cole v. Young,* 76 S. Ct. 861, 867 (1956). On this basis, it is contended that the lower courts' holding that §263 implements §101, Public Law 89-687, and thus validates its application to Petitioners, should be disapproved by this Court.

With respect to the district court's implication, by reference to 1 Davis, Administrative Law Treatise, 76 (1968), (Opinion, Appendix B, *infra,* p. 25) that this Court "appears merely to have 'paid lip service' to the doctrine" of nondelegation of powers since *Schechter v. United States,* 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), citations indicating the contrary including the following:

Kent v. Dulles, 357 U.S. 116 (1958); *Zemel v. Rusk,* 381 U.S. 1 (1965); *Hirabayashi v. United States,* 320 U.S. 81 (1943); *Yakus v. United States,* 321 U.S. 414 (1944); and *Bowles v. Willingham,* 321 U.S. 503 (1944).

The Constitution grants exclusively to Congress the power to "raise and support armies" and "to make rules for the government and regulation of the land and naval forces." Article I, Sec. 8. It is submitted that an attempt by Congress by enactment of Public Law 89-687 to transfer those powers to the President, even for a limited period, for his exercise "when he deems it necessary," is in fact "palpable abuse or true congressional abdication" of the non-delegation doctrine, to quote Professor Davis, *supra.*

On the question of validity of the Department of the Army's order activating Petitioners for 24 months, without crediting them with previous active duty service, reference is here made to the entirety of Part I of Mr. Justice Douglas' dissenting opinion. On Applications for Stays (Appendix C, *infra*, p. 29). The latter properly presents the position of Petitioners on that question.

If, as Petitioners contend, the Department of the Army's order activating Petitioners exceeded its authority, then said order was invalid and void as issued and Petitioners should be granted the relief they seek. *Service v. Dulles,* 354 U.S. 363, 372 (1957); *Smith v. United States,* 155 S. Ct. 682, 691 (1961); *Ingalls v. Zuckert,* 309 F. 2d 659 (D.C. Cir. 1962).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ELSBETH LEVY BOTHE,
Attorneys for Petitioners.

Dated: November 20, 1968

APPENDIX A.

PUBLIC LAW 89-687, Title 1, §101, October 15, 1966, 80 Stat. 981.

(a) Notwithstanding any other provision of law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit in the Selected Reserve, and

(2) has not fulfilled his statutory reserve obligation, and

(3) has not served on active duty or active duty for training for a total of twenty-four months.

(b) Notwithstanding the provisions of any other law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who had become a member of a reserve component prior to July 1, 1966; and who

(1) has not served on active duty or active duty for training for a period of one hundred and twenty days or more, and

(2) has not fulfilled his statutory reserve military obligation.

(c) A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months. If the enlistment or period of military service of a member of the Ready Reserve ordered to active duty under subsections (a) or (b) of this section would expire before he has served the required period of active duty prescribed herein, his en-

listment or period of military service may be extended until that service on active duty has been completed.

(d) In order to achieve fair treatment as between members in the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

(e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.

TITLE 10-§262.

The purpose of the reserve components is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components. August 10, 1956, c. 1041, 70A Stat. 10.

TITLE 10-§263.

Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States,

or such parts of them as are needed, together with units of other reserve components necessary for a balanced force, shall be ordered to active duty and retained as long as so needed. August 10, 1956, c. 1041, 70A Stat. 11.

TITLE 10-§672.

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However—

(1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available; and

(2) a member of the Standby Reserve may not be ordered to active duty under this subsection unless the Director of Selective Service determines that the member is available for active duty.

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an

active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

(c) So far as practicable, during any expansion of the active armed forces that requires that units and members of the reserve components be ordered to active duty (other than for training), members of units organized and trained to serve as units who are ordered to that duty without their consent shall be so ordered with their units. However, members of those units may be reassigned after being ordered to active duty (other than for training).

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

(e) A reasonable time shall be allowed between the date when a Reserve ordered to active duty (other than for training) is alerted for that duty and the date when

he is required to enter upon that duty. Unless the Secretary concerned determines that the military requirements do not allow it, this period shall be at least 30 days. Aug. 10, 1956, c. 1041, 70A Stat. 27; Sept. 2, 1958, Pub.L.85-861, §§1(13), 33(a)(5), 72 Stat. 1440, 1564.

TITLE 10-§673.

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

(b) To achieve fair treatment as between members in the Ready Reserve who are being considered for recall to duty without their consent, consideration shall be given to—

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(2) family responsibilities; and

(3) employment necessary to maintain the national health, safety, or interest.

The Secretary of Defense shall prescribe such policies and procedures as he considers necessary to carry out this subsection. He shall report on those policies and procedures at least once a year to the Committees on

Armed Services of the Senate and the House of Representatives.

(c) Not more than 1,000,000 members of the Ready Reserve may be on active duty (other than for training), without their consent, under this section at any one time. Aug. 10, 1956, c. 1041, 70A Stat. 28; Sept. 2, 1958, Pub.L. 85-861, §§1(14), 33(a)(5), 72 Stat. 1441, 1564.

TITLE 10-§679.

(a) To provide definite terms of active duty (other than for training) for Reserves with their consent, the Secretary concerned may make a standard written agreement with any member of a reserve component under his jurisdiction requiring the member to serve for a period of active duty (other than for training) of not more than five years. When such an agreement expires, a new one may be made. This subsection does not apply in time of war declared by Congress.

(b) An agreement may not be made under subsection (a) unless the specified period of duty is at least 12 months longer than any period of active duty that the member is otherwise required to perform.

(c) Agreements made under subsection (a) shall be uniform so far as practicable, and are subject to such standards and policies as may be prescribed by the Secretary of Defense for the armed forces under his jurisdiction or by the Secretary of the Treasury for the Coast Guard when the Coast Guard is not operating as a service in the Navy.

(d) If an agreement made under subsection (a) expires during a war or during a national emergency de-

clared by Congress or the President after January 1, 1953, the Reserve concerned may be kept on active duty, without his consent, as otherwise prescribed by law. Aug. 10, 1956, c. 1041, 70A Stat. 30.

TITLE 10-§3495.

Members of the Army National Guard of the United States are not in active Federal service except when ordered thereto under law. Aug. 10, 1956, c. 1041, 70A Stat. 198.

TITLE 10-§3500.

Whenever—

(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the Army National Guard of any State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States, the Territories, Puerto Rico, and the Canal Zone, and, in the District of Columbia, through the commanding general of the National Guard of the District of Columbia. Aug. 10, 1956, c. 1041, 70A Stat. 199.

TITLE 10-§8495.

Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law. Aug. 10, 1956, c. 1041, 70A Stat. 524.

TITLE 10-§8500.

Whenever—

(1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the Air National Guard of any State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States, the Territories, Puerto Rico, and the Canal Zone, and, in the District of Columbia, through the commanding general of the National Guard of the District of Columbia. Aug. 10, 1956, c. 1041, 70A Stat. 525.

TITLE 32-§102.

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times. Whenever Congress determines that more

units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed. Aug. 10, 1956, c. 1041, 70A Stat. 597.

TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 11406

ASSIGNING AUTHORITY WITH RESPECT TO ORDERING UNITS IN THE READY RESERVE TO ACTIVE DUTY.

By virtue of the authority vested in me by paragraph (e) of title I of the Department of Defense Appropriation Act, 1967 (80 Stat. 981), and by section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

The Secretary of Defense, and, when designated by him for this purpose, any of the Secretaries of the military departments of the Department of Defense, are hereby authorized and empowered to exercise the authority vested in the President until June 30, 1968, by paragraph (e) of title I of the Department of Defense Appropriation Act, 1967 (80 Stat. 981) to order any unit in the Ready Reserve of an armed force to active duty for a period of not to exceed 24 months.

/s/ Lyndon B. Johnson

THE WHITE HOUSE

April 10, 1968

[F.R. Doc. 68-4521; Filed, Apr. 12, 1968; 1:31 p.m.]

[Letterhead]

THE SECRETARY OF DEFENSE
Washington, D.C. 20301

11 April 1968

MEMORANDUM FOR Secretaries of the Military Departments.

By virtue of the authority vested in me by Executive Order No. 11406, April 10, 1968, I hereby authorize the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, until June 30, 1968, to order units in the Ready Reserve under their respective jurisdictions to active duty for a period of 24 months.

However, the total number of members of the Ready Reserve who may be ordered to active duty hereunder with their units may not be more than as indicated:

(1) Army: 20,034
(2) Navy and Marine Corps: 1,028
(3) Air Force: 3,488.

/s/ Clark M. Clifford

ABBREVIATED JOINT MESSAGEFORM
and/or CONTINUATION SHEET

SECURITY CLASSIFICATION: Unclassified

PRECEDENCE	RELEASED BY	DRAFTED BY	PHONE
ACTION IMMEDIATE		UNCLAS EFTO	
INFO PRIORITY			

UNCLAS EFTO DA859314 From DCSOPS

SUBJECT: Mobilization Order (U)

PART I

1. By direction of the President and pursuant to authority contained in Public Law 89-687, the units listed below, including previously authorized augmentation, and members thereof of the ARNGUS and the Army Reserve are ordered to active duty.

Des	Type Unit	TOE 1/	TOE Str	Mob Sta	Home State

1/ Units will be reorganized under new MTOE at mob station.

CONTROL NO.	TOR/TOD	PAGE NO.	NO. OF PAGES	MESSAGE IDENTIFICATION	INITIAL
DA859314		5	27	UNCLAS EFTO	

REGRADING INSTRUCTIONS

SECURITY CLASSIFICATION: Unclassified

ABBREVIATED JOINT MESSAGEFORM
and/or CONTINUATION SHEET

SECURITY CLASSIFICATION: Unclassified

PRECEDENCE	RELEASED BY	DRAFTED BY	PHONE
ACTION IMMEDIATE INFO PRIORITY		UNCLASSIFIED	

2. The above units and members thereof will be ordered to active duty for 24 consecutive months unless sooner released. Units will be mobilized at home stations effective 13 May 1968 and move to duty station as directed by pertinent area commanders.

a. Enlisted members of units will be ordered to active duty for 24 months or until their unit is released from active duty, unless expiration of their statutory Reserve obligation (10 USC 651(a)) or enlistment results in their earlier release. Unit enlisted members who have completed their statutory Reserve obligation on or before 10 Apr 68 and are in the unit voluntarily will be ordered to active duty for 24 months or until the unit is released from active duty, unless expiration of their enlistment results in their earlier release.

b. Unit officers will be ordered to active duty for 24 months or until their unit is released from active duty.

PART II

3. Upon receipt of this message, authority to enlist non-prior service personnel for the units listed in para 1 above is suspended.

4. The following members of units listed in para 1, above, are exempt from order to active duty:

a. Enlisted personnel whose statutory Reserve obligation or enlistment will expire on or before 12 Dec 68. Such personnel will be

CONTROL NO.	TOR/TOD	PAGE NO.	NO. OF PAGES	MESSAGE IDENTIFICATION	INITIALS
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REGRADING INSTRUCTIONS	SECURITY CLASSIFICATION
	Unclassified

APPENDIX B.

Opinion of the United States Court of Appeals for the Fourth Circuit.

United States Court of Appeals, for the Fourth Circuit.

SP 4 Bradish G. Morse, et al., Appellants, versus Colonel Charles B. Boswell, Commanding Officer, Fort George G. Meade, Maryland; Honorable Clark Clifford, Secretary of Defense; Honorable Stanley R. Resor, Secretary of the Army; General Harold K. Johnson, Chief of Staff of the Army, and Lt. General Jonathan O. Seaman, Commanding General, First United States Army, Appellees. No. 12,738.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

(Argued August 26, 1968. Decided August 26, 1968.)

Before Haynsworth, Chief Judge, and Winter and Butzner, Circuit Judges.

Nathan R. Zahm (Elsbeth Levy Bothe on brief) for Appellants, and Alan I. Baron, Assistant United States Attorney, (Stephen H. Sachs, United States Attorney, on brief) for Appellees.

PER CURIAM:

For the reasons stated by the District Court, *Morse v. Boswell,* D. C., Md., ... F. Supp. ..... (decided August 6, 1968), the judgment is affirmed. See also, *Goldstein v. Clifford,* D. C., N. J., ...F. Supp. ..... (statutory three-judge court, decided August ...., 1968).

The Clerk is directed to issue the mandate forthwith.

Affirmed

Opinion of the United States District Court for the District of Maryland.

In the United States District Court, for the District of Maryland.

SP4 Bradish G. Morse, ER 15 729 742, et al. v. Colonel Charles B. Boswell, Commanding Officer, Fort George G. Meade, Maryland, et al. Civil No. 19734.

Filed: August 6, 1968.

Nathan R. Zahm, Sherman Oaks, California and Elsbeth Levy Bothe, Baltimore, Maryland, for Petitioners.

Stephen H. Sachs, United States Attorney and Alan I. Baron, Assistant United States Attorney, for Respondents.

Kaufman, District Judge.

One hundred thirteen (113) members of the United States Army Reserve instituted this proceeding, seeking (a) habeas corpus relief under 28 U.S.C. §2241 *et seq.*, and (b) injunctive relief, both preliminary and permanent. In connection with their quest for injunctive relief, petitioners originally asked that a three-judge court under 28 U.S.C. §§2282 and 2284 be convened. The request for injunctive relief has, however, been dropped[1] and, by agreement of counsel for both sides, this petition is treated as one hundred thirteen (113) separate petitions for writs of habeas corpus. A consolidated hearing has been held under Rule 42(a) of the Federal Rules of Civil Procedure, in pursuance of that agreement of counsel. The named respondents are the Com-

[1]Thus, the issue of whether a three-judge Court should or should not be convened with regard to the requested injunctive relief has become moot. No opinion is expressed herein with regard to that question.

manding Officer of Fort George G. Meade, Maryland, the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Commanding General of the First United States Army. Petitioners, all Ohio citizens, comprise about one-half of the enlisted men in the 1002d Combat Support Company, which was activated on May 13, 1968, and is presently stationed at Fort Meade.

Petitioners were ordered to active duty by an Army Order dated April 19, 1968, issued under the authority of Subsection (e) of Section 101 of Public Law 89-687. They contend that such order is invalid because the application to them of that statute is illegal and unconstitutional.

Each of the petitioners enlisted in the Army Reserve before October 15, 1966, and has performed his obligations satisfactorily to date. When each of the petitioners enlisted, he signed two documents, entitled respectively "Enlistment Record" and "Reserve Component Service Agreement." The latter document set forth various requirements and duties the enlistee was expected to fulfill,[2] but contained no explicit provision concerning the circumstances under which the Ready

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[2]Including the length of the military obligation, the duty to attend training meetings, the requirement of 26 weeks of active duty training, the requirement of attending at least 48 drills per year after active duty training, the requirement of attending summer camp and the duty to transfer to other units in certain circumstances. The document also stated that the enlistee understood that in case of unsatisfactory performance of the requirements mentioned, the enlistee could be required to perform 45 days of active duty or be reported to Selective Service for immediate induction. The document also stated that the enlistee understood that the enlistment would be extended for the duration (plus 6 months) of any war or national emergency declared by Congress.

Reserve could be called to active duty. The fine print in the first document states, *inter alia:*

> . . . I understand that I am expected to be available for order to active duty at any time during this enlistment in event of a mobilization or emergency requiring any services. . . .

Neither the word "mobilization" nor the word "emergency" is defined.[3]

All counsel agree that the provisions of statutory law existing when each petitioner signed those two documents are incorporated in the documents and became part and parcel of the enlistment contract. This would seem, in any event, to be a result compelled by law. See *Home Building and Loan Association v. Blaisdell,* 290 U.S. 398, 435 (1934); *Brotherhood of Railway and Steamship Clerks v. Railway Express Agency,* 238 F.2d 181, 184 (6th Cir. 1956).

At the time each of petitioners enlisted, Sections 262, 263, 672 and 673 of 10 U.S.C. were in force and effect.

Title 10, Section 262, sets out the purpose of the reserve components:

> The purpose of the reserve components is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency *and at such other times as the national security requires,* to fill the needs of the armed forces whenever, during, and

[3]In view of the clear application of certain statutory language discussed at length in this opinion, this Court places no reliance or weight upon the above-quoted fine print language though the presence of the word "emergency" hardly derogates from the conclusions reached in this opinion.

after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components. [emphasis added].

Title 10, Section 263, sets out the basic policy for order into Federal Service:

Whenever Congress determines that more units and organizations are needed for the *national security* than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with units of other reserve components necessary for a balanced force, shall be ordered to active duty and retained as long as so needed. [emphasis added].

Title 10, Section 672, provides in pertinent part:

In time of war or of national emergency declared by Congress, *or when otherwise authorized by law,* an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. [emphasis added].

Title 10, Section 673, provides in pertinent part:

In time of national emergency declared by the President after January 1, 1953, *or when otherwise authorized by law,* an authority designated

by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months. [emphasis added].

On October 15, 1966, after the enlistment of each petitioner, Public Law 89-687, a military appropriations bill, became effective. Section 101(e) of said law provides:

> Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.[4]

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[4]The preceding Subsections of Section 101 read as follows:

(a) Notwithstanding any other provision of law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit in the Selected Reserve, and

(2) has not fulfilled his statutory reserve obligation, and

(3) has not served on active duty or active duty for training for a total of twenty-four months.

(b) Notwithstanding the provisions of any other law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who had become a member of a reserve component prior to July 1, 1966; and who

(1) has not served on active duty or active duty for training for a period of one hundred and twenty days or more, and

(2) has not fulfilled his statutory reserve military obligation.

(c) A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months. If the enlistment or period of military service of a member of the Ready Reserve ordered to active duty

On April 10, 1968, the President delegated his au-

under subsections (a) or (b) of this section would expire before he has served the required period of active duty prescribed herein, his enlistment or period of military service may be extended until that service on active duty has been completed.

(d) In order to achieve fair treatment as between members in the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

Petitioners contend that the provisions of subsection (d) are applicable to subsection (e), as well as to one or more, or all of subsections (a), (b) and (c). Petitioners originally alleged that petitioners were not notified of their right to request deferment for reasons set out in subsection (e). The uncontradicted testimony of the Commanding Officer of the 1002d Combat Support Company established to the contrary. That officer testified in this case that at a meeting of the entire company during a weekend drill on April 20-21, 1968, the Commanding Officer of the 1002d informed the entire unit of each individual's right to apply for a "Delay in Reporting for or an Exemption from Active Duty" pursuant to Army Regulation 601-25. A later meeting in a classroom was held for any individual interested in applying for the exemption or delay. At the meeting, the entire Regulation was read to them and they were instructed in the mechanics of applying for such special consideration. Between that meeting and May 13, 1968, 19 individuals in the unit applied for exemptions and 4 applied for delays. All applications were acted upon by the Army prior to May 13. Most were refused, but the Commanding Officer testified that he knew of one member of his unit who received an exemption from active duty because he had three children. After arriving at Fort Meade on approximately May 16, approximately 36 individuals in the unit requested discharges, reassignments or transfers. Included in at least the latter group are several of the petitioners. These 36 requests are in various stages of proceedings; some have been turned down while some are still pending.

During oral argument following such testimony, counsel for petitioners stated he was no longer pressing that there had been any total failure of compliance with subsection (e). In any event, this Court hereby finds that those provisions were in fact complied with. Whether, as a matter of law, the subsection (d) requirements apply to a subsection (e) situation poses a question which this Court need not reach.

(This footnote is continued on the next page)

thority under that statute to the Secretary of Defense.[5] On April 11, 1968, the Secretary of Defense authorized the Secretaries of the Military Departments "to order units in the Ready Reserve under their respective jurisdictions to active duty for a period of 24 months," subject only to numerical limitations not here in issue. On the same day, the Secretary of the Army ordered the 1002d Supply and Service Company, a unit of the Army Ready Reserve, along with many other reserve components, to active duty. On April 19, 1968, an Army order announced that the 1002d was ordered to report for active duty on May 13, 1968. During the entire month of April 1968, and since then, all of petitioners were, have been, and are members of the 1002d.

Petitioners also argue that as a matter of due process, persons affected by subsection (e) are not only entitled to the protection provided statutorily by subsection (d), but that subsection (d) is facially unconstitutional because it does not meet due process requirements of notice and hearing. This Court holds that that contention has little or no merit, both under the facts as found in this case and as a proposition of law. *Cf.* United States v. Dicks, Appeal No. 11,705 (4th Cir. 1968) and United States v. Capson, 376 F.2d 814, 815 (10th Cir. 1967); Storey v. United States, 370 F.2d 255, 263 (9th Cir. 1966), cited in *Dicks* at p. 8 of the slipsheet copy of the opinion.

[5]Executive Order No. 11406, 33 C.F.R. 5735 (1968), provides:

> By virtue of the authority vested in me by paragraph (e) of title I of the Department of Defense Appropriation Act, 1967 (80 Stat. 981), and by section 301 of title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:
>
> The Secretary of Defense, and, when designated by him for this purpose, any of the Secretaries of the military departments of the Department of Defense, are hereby authorized and empowered to exercise the authority vested in the President until June 30, 1968, by paragraph (e) of title I of the Department of Defense Appropriation Act, 1967 (80 Stat. 981) to order any unit in the Ready Reserve of an armed force to active duty for a period of not to exceed 24 months.

Petitioners state two principal contentions: (1) They have a contract with the United States Government which is being violated and abridged by the application to them of Section 101(e) of Public Law 89-687. (2) Public Law 89-687, Sec. 101(e), as applied to them, constitutes a denial to them of the equal protection of the laws and is, in any event, invalid as a violation of the separation of powers doctrine. These contentions must be examined in the light of the statutes in force and effect when each of the petitioners enlisted.

The Government has moved to dismiss the petition which the one hundred thirteen reservists have filed in this proceeding. This Court will treat that motion as a motion for summary judgment under Rules 12(c) and 56 in view of the fact that testimony and exhibits, as well as pleadings, are involved. In so doing, this Court notes the absence of any genuine dispute of material fact, and that the presentations to this Court by both counsel are directed solely to legal, as opposed to factual, issues.

I.

10 U.S.C. §673 provides that "[i]n time of national emergency declared by the President, after January 1, 1953, *or when otherwise authorized by law,* an authority designated by the Secretary concerned may, without the consent of the persons affected, order" any Ready Reserve unit to active duty "for not more than 24 consecutive months." Petitioners argue that the words "when otherwise authorized by law" have no prospective meaning, and that that phrase does not refer to any law passed after September 2, 1958, when the entire text of 10 U.S.C. §673 was amended to its present form. No

authority is cited for such statutory construction. To this Court, the word "when" clearly looks to the future. *Winters v. United States,* 281 F.Supp. 289, 295 (E.D. N.Y. 1968), *aff'd per curiam,* 390 F.2d 879 (2d Cir. 1968), states that ". . . Public Law 89-687 explicitly applied to persons already enlisted." That opinion was affirmed in a *per curiam* opinion by Circuit Judges Friendly and Smith and District Judge Gignoux, in which the "well reasoned" quality of the District Court's opinion was noted. On the other hand, the holding in *Gion v. McNamara,* Civil No. 67-1563-EC (C.D. Cal., Jan. 9, 1968), reaches what appears to be a contrary result, although there is no reference therein to 10 U.S.C. §673, nor any mention of any possible inter-relationship of the latter with Public Law 89-687. In *Ali v. United States,* Civil No. 68-986-S (C.D. Cal., July 2, 1968), and *Pfile v. Corcoran,* Civil No. C-824 (D.Colo., July 22, 1968), petitioners, who, like the plaintiffs in *Winters and Gion* were reservists, were denied relief, though the order in *Ali* and the opinion in *Pfile* rest heavily on the constitutional power of Congress to raise armies rather than on construction of the applicable enlistment contracts and the statutory provisions in existence at the time those contracts were entered into.

Counsel have not brought to the attention of this Court, nor does this Court have knowledge of, any cases other than *Winters, Gion, Ali* and *Pfile,* which have dealt with the application of Section 101 of Public Law 89-687. Neither *Winters* nor *Gion* nor *Ali* nor *Pfile* relates in any way to the application of subsection (e) and the activation of an entire reserve unit. Each deals with an individual who was called up under Public

Law 89-687 for unsatisfactory performance of his reserve duties.[6]

In *Gion,* a Marine Reservist was called up under Public Law 89-687, for unsatisfactory performance of inactive duty requirements. After the District Court's judgment in his favor was appealed by the Government, Gion was discharged by the Marine Corps as a conscientious objector.[7] The opinion in *Gion* is brief. If it stands for the proposition that the "otherwise authorized by law" phrase of 10 U.S.C. §673 has no prospective effect, this Court respectfully states its disagreement and its agreement with Judge Dooling's statement in *Winters,* in which the marine enlistment documents contained words similar to "when otherwise authorized

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[6]*Winters* and *Gion* were marines serving under enlistment contracts containing somewhat different provisions than those signed by petitioners herein. In *Gion,* the marine reservist signed an enlistment contract providing in part: "37. I understand that upon enlistment . . . I may not be ordered to active duty without my consent except in time of war, or when, in the opinion of the President a national emergency exists, or when, otherwise prescribed by law, . . ." The *Gion* document contains a prohibition against activation except under certain stated alternative conditions. No such prohibition is set forth in any of the documents signed by petitioners or in any of the statutes which are incorporated into them. In *Pfile,* the petitioner seems to have signed an enlistment document similar to those entered into by petitioners in this case. The brief order in *Ali* reveals only that the case involved reservists called up under Public Law 89-687. Counsel for petitioners have informed this Court that the plaintiffs therein were Army Reservists, not assigned to any unit, who were ordered to duty under that law. Counsel for petitioners also have stated that an appeal has been noted from the District Court's judgment in *Ali.*

[7]Counsel for petitioners has stated to this Court that after Gion's discharge, the Ninth Circuit remanded the case to the District Court for such action as is deemed by it to be appropriate.

by law" with respect to active duty obligations. Judge Dooling wrote:

> The [Marine Corps] Bulletin applied by its terms to men already enlisted and Public Law 89-687 explicitly applied to persons already enlisted. Both the enlistment contract and the Statement of Understanding contemplate that the obligations which the enlisted man undertakes include not only any additional active duty imposed in a national emergency or in time of war but also additional active duty "otherwise prescribed by law" or "as the law may require." Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and the Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate indirectly as a fetter upon the Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that the Congress should consider in enacting new law. [281 F.Supp. 295-96].

This Court holds that the provisions of 10 U.S.C. §673 are part of each of the contracts entered into by petitioners herein and that Public Law 89-687 was enacted in pursuance of 10 U.S.C. §673 and the "when

otherwise authorized by law" language which is included therein.

But even if 10 U.S.C. §673 had never been enacted, this Court believes that Public Law 89-687 does not abridge the provisions of the contractual documents petitioners rely upon since these instruments include by incorporation 10 U.S.C. §263. Petitioners contend that Public Law 89-687 was not enacted in furtherance of 10 U.S.C. §263 because Congress did not use the magic words "national security" in enacting the 1966 law. Further, petitioners argue that the words "national security," as used in 10 U.S.C. §263, relate only to defense of the borders of the United States. Finally, petitioners contend that 10 U.S.C. §263 violated "equal protection" concepts because it applies only to units, not to individuals. This Court rejects all three contentions. In enacting Public Law 89-687, the Congress clearly had in mind our national security. The idea that national security involves only defense of our home borders, while highly appealing at the time of President Washington's Farewell Address, was hardly the basis for Congressional policy in the 1950's when 10 U.S.C. §673 was enacted. The "equal protection" argument in connection with 10 U.S.C. §263 fails for the same reasons as are discussed, *infra,* with regard to a similar attack on Public Law 89-687 itself.

This Court holds that the provisions of 10 U.S.C. §§262, 263, 672 and 673 are incorporated in the enlistment contracts here in issue; that Public Law 89-687 implements and is in furtherance of both 10 U.S.C. §673 and 10 U.S.C. §263, considered separately, and of 10 U.S.C. §§262, 263, 672 and 673 read as a whole; and that therefore Public Law 89-687 does not abridge

those contracts. The language of those sections of 10 U.S.C. makes it clear that the Congress retained for itself the right to activate the Ready Reserve, not only after a declaration of war or of a national emergency, but also if Congress determined[8] such activation to be in the national interest.

II.

Petitioners attack Public Law 89-687 as arbitrary and unconstitutional because it provides for the activation of entire reserve units, under subsection (e), for periods of twenty-four months, with no credit to a member of the unit for prior individual active duty service, and at the same time calls for activation of individual members under subsection (c) for periods of twenty-four months with credit for prior active duty service. Assuming that in this case the due process clause of the Fifth Amendment incorporates equal protection concepts (see *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954)), rational differences in treatment of units and individuals are clearly not violations of those concepts. Variations based on reason are not constitutionally forbidden nor is uniformity required in the absence of arbitrary discrimination. See e.g., *Whitney v. State Tax Commission of New York,* 309 U.S. 530, 541-42 (1940), in which Mr. Justice Frankfurter wrote: "Differences in circumstances beget appropriate differences in law." Clearly, Congress could sensibly decide that trained units are more valuable and more needed than individual reservists.

Petitioners further contend that Section 101(e) of Public Law 89-687 is entirely void because it constitutes

[8]In the exercise of its power under Art. I, §8, United States Constitution.

an unconstitutional delegation of power by the Congress to the President. Specifically, petitioners argue that Section 101(e), in and of itself, constitutes nugatory action by Congress became it is violative of the separation of powers doctrine. Petitioners cite *Schechter v. United States,* 295 U.S. 495 (1935). But that case dealing with the National Industrial Recovery Act and its sweeping delegation of unbridled discretionary economic power, as well as the related opinion in *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), dealing with the so-called "hot oil" provisions, involved delegations which are a far-cry from the simple delegation to the Commander-in-Chief to call up reservists for as much as two years, particularly in a statute which provided that such power would exist only for twenty-two and one-half months. Far broader delegations, without explicit standards and with even fewer implicit standards than are present in Section 101(e), have been upheld by the Supreme Court in the years which have passed since 1935. See e.g., *Fahey v. Mallonee,* 332 U.S. 245 (1947) and *Arizona v. California,* 373 U.S. 546, 583 (1964). *See also* the discussion in 1 Davis, Administration Law Treatise, 76 (1968). The delegation in Section 101(e) of Public Law 89-687 is clearly not unconstitutional. That law does not violate any constitutional precept, be it equal protection of the laws or separation of powers. Enacted against the backdrop of 10 U.S.C. §§262, 263, 672 and 673, Section 101(e) fully empowers the call to active duty of which petitioners complain.

III.

In view of the construction of the enlistment documents and the statutes above discussed, this Court has no need to resolve the constitutional issue of whether

the Government can invalidate, in whole or in part, the reserve contract provisions here in issue, by subsequent legislation, under the Article 8 war powers of Congress. This Court notes the application of that doctrine in *Pfile v. Corcoran, supra,* in which the Court, after quoting from and relying upon the construction of Public Law 89-687 in *Winters,* referred to *City of El Paso v. Simmers,* 379 U.S. 497 (1965), and concluded that "a contract such as the present one always stands in the shadow of the exercise by Congress of positive paramount sovereign powers." In this case, in view of the ample statutory authorization which is interwoven into the contracts, this Court can afford to avoid that constitutional issue.

This Court hereby denies the relief petitioners seek.

(Signed) Frank A. Kaufman
United States District Judge

APPENDIX C.

Order.

Supreme Court of the United States.

No. ....., October Term, 1968.

MORSE, et al., Petitioners, vs. BOSWELL, Etc., et al.

UPON CONSIDERATION of the application of counsel for the petitioners and of the opposition of the respondents thereto,

IT IS ORDERED that the deployment of the petitioners to service outside the territorial boundaries of the United States be, and the same is hereby, stayed to enable the Court to consider and pass upon such application on or after October 7, 1968.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 12th day of September, 1968.

Supreme Court of the United States.

MORSE et al. v. BOSWELL et al.; BERKE et al. v. MAC LAUGHLIN; MIAZGA et al. v. MAC LAUGHLIN; FELBERBAUM et al. v. MAC-LAUGHLIN; and LOONEY et al. v. MAC LAUGHLIN, October Term, 1968.

On Applications for Stays.

[October 7, 1968.]

The applications for stays in these cases presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, are denied.

MR. JUSTICE DOUGLAS, dissenting.

On April 10, 1968, the President delegated to the Secretary of Defense power to activate units of the Ready Reserve.[1] On the following day, after receiving a similar delegation of authority to activate such units from the Secretary of Defense,[2] the Secretary of the Army called several units of the Ready Reserves and their members to active duty.[3] Applicants, who are members of those units, are challenging that call to active duty on the ground that it exceeds the authority of the Secretary of the Army, and is a violation of their enlistment contracts. After unsuccessfully seeking release from active duty by writ of habeas corus, and before being able to petition this Court for certiorari, applicants were prepared for immediate shipment to Vietnam. To preserve their avenues of review they

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[1]Exec. Order No. 11,406, 33 Fed. Reg. 5735 (1968).

[2]Memorandum for Secretaries of the Military Departments, April 11, 1968, as cited in Brief for Appellees at 5. *Morse et al. v. Boswell et al.*, Civ. No. 12,738 (4th Cir., August 26, 1968).

[3]Joint Message form DA 859314, April 11, 1968, as cited in Brief for Appellees, *id.*

sought and I granted interim stays pending submission of the stay applications of the full Court.[4] The question now before the Court, therefore, is whether these stays should continue pending our consideration of their petitions for certiorari.

Questions underlying the merits, which have already produced some judicial disagreements,[5] are twofold:[6] first, an alleged usurpation by the Secretary of the Army of the limited authority delegated him; second, a purported conflict between the conditions of enlistment under which applicants entered the reserves and the subsequent Act of Congress calling them to active duty.

I.

First, Applicants argue that the Secretary of the Army improperly called them to active duty for a full period of 24 months, without giving them credit for time already served on active duty. They claim that, in doing so, he exceeded the power granted him. To substantiate their claim, applicants rely on the specific language of delegation, on the treatment of other reservists similarly situated, and on the original intent of Congress.

The language of delegation is in § 101 (e) of Pub L. 89-687, Title I, October 15, 1966, 80 Stat. 981, under which applicants were called. Congress authorized the

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[4]Applicant in the *Winters* case, 390 U. S. 993 had been called to duty as an individual rather than as part of a unit; and unlike applicants in these cases, apparently did not challenge the authority of the Secretary of the Army to call him for a full 24 months of active duty irrespective of time already served on active duty.

[5]Compare *Winters v. United States,* 281 F. Supp, 289 (E. D. N. Y.), aff'd per curiam, 390 F. 2d 879 (2d Cir. 1968), with *Gion v. McNamara,* Civ. No. 67-1563 (C. D. Calif., January 9, 1968).

[6]Applicants have also raised other questions which I consider too unsubstantial to discuss.

President to activate "any *unit* of the Ready Reserve of an armed force for a period not to exceed twenty-four months." The President, in turn, delegated his authority under subsection (e) to the Secretary of Defense to activate "any *unit* in the Ready Reserve . . . for a period not to exceed twenty-four months."[7] The Secretary of Defense then delegated his authority by that same language to the Secretary of the Army.[8] The Secretary of the Army, however, called "the above *units and individual members thereof* . . . to active duty for twenty-four consecutive months. . . ."[9] Thus, instead of calling the above units to active duty and granting their individual members credit for time already served on active duty, he ordered the individuals themselves to active duty for 24 consecutive months, irrespective of any time they may have already served on active duty. In doing so, he seems to have gone beyond the above language of delegation which referred exclusively to *units*. Moreover, he seems to have violated the organic language of Pub. L. 89-687, Title I, § 101 (c), October 15, 1966, 80 Stat. 981, which provides that:

> "A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals 24 months."

To uphold the Secretary's order would seem to discriminate against these applicants called to active duty *as part of units* under § 101 (e) in favor of those reservists called to active duty as individuals under

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[7] *Supra*, n. 1 (emphasis added).
[8] *Supra*, n. 2 (emphasis added).
[9] *Supra*, n. 3 (emphasis added).

§101(a) and (b), by withholding from the former credit which is concededly accorded the latter.[10]

Congress authorized the President to recall the Ready Reserve for two stated purposes: First, to free the President to mobilize those men without forcing him to declare a national emergency;[11] second, and more relevant to this inquiry, to make the active duty obligation of those who enlist in the reserves commensurate with that of those who are drafted. It was felt that young men were enlisting in the reserves "to escape active military service in South Vietnam";[12] that Congress had allowed "the 6-month [reserve] training program to become 'an umbrella' for avoiding active service at a time when we are daily inducting large numbers of men into the active forces to fight in Vietnam";[13] and, therefore, that "it was only fair that these reservists be put on the *same basis for service* in Vietnam

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[10]In enacting Pub. L. 89-687, § 101, Congress made a distinction between reservists called as individuals and reservists called as units. That distinction however related only to its desire to keep reserve units as much intact as possible; consequently, it only authorized the call of those individual reservists who were not attached to such units, who had not been participating satisfactorily in their present units, or who had had less than 120 days of active duty experience. The distinction between individuals and units would seem to have nothing to do with the question whether reservists called as part of units should be credited for time already served on active duty. In making permanent the President's temporary authority to activate for 24 months those individuals not participating satisfactorily in their reserve units, Congress reaffirmed its intention to credit them for time already served on active duty. Pub. L. 90-40, June 30, 1967, 81 Stat. 100, 105.

[11]112 Cong. Rec. 19718 (1966) (remarks of Senator Richard Russell, Chairman of Senate Armed Services Committee, and co-sponsor of the amendment).

[12]112 Cong. Rec. 19724 (1966) (remarks of Senator Lausche).

[13]112 Cong. Rec. 19720 (1966) (remarks of Senator Stuart Symington, member of Senate Armed Services Committee).

as new enlistees and draftees."[14] Thus, it seems that Congress intended to subject reservists to the same obligation for two-year active duty as is borne by draftees. To do so, it allowed the President to call them for the balance between the time they had already served on active duty and the outer time limit of 24 months.

The President and the Secretary of Defense apparently read the Act of October 15, 1966, as I do; for each of them activated only units of the reserve for 24 months. And a unit, of course, can serve 24 months even though its original members, having already served some time, are sooner discharged. The Secretary of the Army, on the other hand, has subjected these reservists to an additional obligation of 24 months over and above time already served.

II.

Second. The question just discussed covers, so far as we call tell from the fragmentary pleadings and findings, all of the appellants. The second question reaches some of the appellants, but just how many we do not know. The record is not very revealing. But on oral argument, various attorneys stated that the contracts of enlistment vary. According to these informants, some provide for the rendering of active duty "in the event of a mobilization or emergency." Others provide for active duty in "time of war or of national emergency declared by Congress" as provided in 10 U. S. C. § 672. It should not lightly be concluded that a contract has been unilaterally changed by one party,[15] or that

[14]112 Cong. Rec. 19500 (1966) (remarks of Senator Saltonstall, ranking minority member of the Senate Armed Services Committee and co-sponsor of the amendment) (emphasis added).

[15]Cf. *Bell v. United States,* 366 U. S. 393; *Perry v. United States,* 294 U. S. 330; *United States v. Grimley,* 137 U. S. 147, 150.

the United States as a party will breach its contract. Cf. *Smyth v. United States,* 302 U. S. 329.

Where the enlistment contract provides for service in the event of "a mobilization or emergency," I would assume that a wide variety of events might encompass each term. Indeed the very summoning of reserves to active duty might itself be sufficient to constitute the condition subsequent. But where the enlistment contract contains a provision that active duty is only required in "time of war or of national emergency declared by Congress," I would, if possible, read the Act of October 15, 1966, to preserve that promise solemnly made to the reservists and not to cover those who were specifically required by contract to serve only "in time of war or national emergency declared by Congress."

I assume that it is within the power of Congress to change existing law and no type of estoppel interferes with its law-making power. See Stone, J., concurring, *Perry v. United States,* 294 U. S. 330, 359. The disappointment realized by those who relied only on general law but did not have that explicit promise from their government in contract form is disappointment of the kind shared by all citizens in a society of shifting law. Where a reservist, however, has counted on a declaration of war or of an emergency before he is called up and has a contract calling for reserve duty on those precise terms, I would, if possible, read subsequent legislation so as to preserve the promise made in that enlistment contract. Cf. *Woods v. Stone,* 333 U. S. 472, 481 (dissenting opinion). 10 U. S. C. § 673 subjects reservists to call "[i]n time of national emergency declared by the President after January 1, 1953, *or when otherwise authorized by law.*" The Congress has not

yet declared either war or national emergency within the meaning of § 672; nor has the President declared a national emergency within the meaning of § 673. As stated by Senator Russell:[16]

> "Mr. President, I cannot see how any realistic answer can be raised against this amendment [calling up the reserves]. They say, 'You can call up the units.' In the first place, it cannot be done, because the President of the United States has to declare a national emergency, and very naturally he does not want to declare a national emergency at this time after we have gone this far without it. . . . [A] declaration of national emergency would make us look ridiculous in the eyes of the world—to declare a state of emergency in regard to a third-rate power like North Vietnam."

Thus, the only other provision which §§ 672-673 include as a "condition prescribed by law" for activating the reserves under the second type of enlistment contract described above lies in the phrase "or when otherwise authorized by law."

The phrase in § 673 "when otherwise authorized by law" is not without meaning. It plainly refers to those additional conditions—other than war or national emergency—upon which members of the reserve can be called to active duty.[17]

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[16]112 Cong. Rec. 19726 (1966) (Chairman of Senate Armed Services Committee).

[17]Under 10 U. S. C. § 672 (b), a reservist may be called to active duty at any time for a period of 15 days. Pursuant to 10 U. S. C. § 679 a reservist may sign an active agreement by which he obligates himself to serve at any time on active duty that he is called; furthermore, that obligation may be extended beyond the expiration date of the agreement in times of war or national emergency. 10 U. S. C. § 672 (d).

One more issue remains. It has been suggested that 10 U. S. C. § 263 gives Congress the power to recall the reserves not just in time of war or national emergency, but "whenever needed for the national security." No one, however, disputes that power. For the issue is not the plenary power of Congress under the Constitution, but how legislation shall be read in order, if possible, to avoid creating a "credibility gap" between the people and their government.

III.

"The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations." *Hamilton v. Kentucky Distillers Co.,* 251 U. S. 146, 156. For that reason, this Court will exercise jurisdiction to review criminal adjudication by the military of civilian (*Reid v. Covert,* 354 U. S. 1) and military (*Burns v. Wilson,* 346 U. S. 137) personnel alike and to review administrative action by the military. Thus, in *Orloff v. Willoughby,* 345 U. S. 83, where a military doctor complained that the Secretary of the Army had wrongfully denied him medical detail, we were unanimous in agreeing that we had jurisdiction to review the power of the Secretary; that he had no power to deny petitioner such medical assignments; and that we were prepared to prevent him from doing so. Similarly here, where the Secretary purportedly has no power to recall reservists whom he promised to activate only in war or national emergency, we have jurisdiction to prevent him from doing so, at least where Congress has not precluded such jurisdiction. See *Harmon v. Brucker,* 355 U. S. 579, 581-583.

I would continue the stays until the merits of this important controversy can be resolved.